

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Investigation on Motion of the Department)	
of Natural Resources of an Alleged Unlawful)	
Construction and Maintenance of a Pier on)	3-SD-94-2019
the Bed of Green Lake, Town of Green Lake,)	
Green Lake County, Wisconsin, by the)	
Sunrise Point Development Corporation)	
Application of Sunrise Point Development)	
Corporation for a Permit to Construct Piers)	3-SD-94-2019P
on the Bed of Green Lake, Town of Green)	
Lake, Green Lake County)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PERMIT

The Department of Natural Resources' Southern District staff alleges that Sunrise Point Development Corporation placed pier and boat slip structures on the bed of Green Lake in violation of §§30.12, 30.13 and 30.15, Stats. The Department further alleges that the piers and boat slips interfere with the rights and interests of the public in Green Lake and constitute a public nuisance pursuant to §30.294, Stats. Additionally, Sunrise Point Development Corporation applied to the Department of Natural Resources for a permit to construct pier and boat slip structures on the bed of Green Lake. Pursuant to §30.02(3), Stats., the Department of Natural Resources requested a public hearing before the Division of Hearings and Appeals on the application.

Pursuant to due notice, a combined hearing was held in Green Lake, Wisconsin on July 17 and August 28, 1995, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The briefs were filed on September 20, 1995.

In accordance with §§227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

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APPLICABLE LAW

Section 30.13(1), Stats., provides:

A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

- (a) The wharf or pier does not interfere with public rights in navigable waters.
- (b) The wharf or pier does not interfere with rights of other riparian proprietors.
- (c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).
- (d) The wharf or pier does not violate any ordinances enacted under sub. (2).
- (e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

Section 30.13(4)(a), provides:

(4) Unlawful obstruction. (a) Interferes with public rights. A wharf or pier which interferes with public rights in navigable waters constitutes an unlawful obstruction of navigable waters unless a permit is issued for the wharf or pier under s. 30.12 or unless authorization for the wharf or pier is expressly provided.

Sections 30.12(1) and (2), Stats., provide in relevant part:

(1) General prohibition. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established;

(2) Permits to place structures or deposits in navigable waters; generally. The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation . . . and is not detrimental to the public interest.

FINDINGS OF FACT

1. Sunrise Point Development Corporation (Sunrise Point or applicant) owns real property located at Government Lot 1, Section 33, Township 16 North, Range 13 East, Green Lake County, Wisconsin. The applicant purchased the subject property from Adelbert Formiller who operated a resort known as the Holiday House at the site. The property abuts Green Lake which is navigable in fact. The property is located along the south shore of Green Lake. The west side of the property abuts a dredged channel. Sunrise Point has 650 feet of frontage at the site. Roughly half the frontage is on Green Lake and half is on the dredged channel.

2. Green Lake covers an area of approximately 7,325 acres and has a maximum depth of 237 feet. Green Lake supports a variety of recreational activities including boating, fishing, sailing, hunting, swimming, and waterskiing. The shoreline of Green Lake is approximately 27 miles in length. Of this 27 miles, twenty miles are already developed. Of the seven miles which are undeveloped, only 1.5 miles are on the main body of the lake. The value of property on Green Lake is increasing rapidly. As property values increase, the pressure for more development, particularly pier and boat slip construction is also increasing.

3. The parcel owned by Sunrise Point is zoned Recreational. Adjoining parcels are zoned Single Family Residential.

4. Sunrise Point has constructed eighteen condominiums units on the property and has plans to construct eighteen more units. On the site Sunrise Point has constructed piers with twenty-two boat slips on the bed of the dredged channel (channel piers) and a pier with fourteen slips on the bed of Green Lake (lake pier). Sunrise Point has also constructed a tee-shaped "swimming pier" on the bed of Green Lake west of the lake pier. Sunrise Point has applied for a permit pursuant to §30.12, Stats., for the above described piers. The application is dated February 2, 1994.

5. In the same application, Sunrise Point also applied for permits to construct a sea wall on the bed of the dredged channel and to place rip rap on the bed of Green Lake. The Department has issued permits for construction of the sea wall and placement of the rip rap. Sunrise Point constructed the sea wall and placed the rip rap in 1994. No permit was issued for the piers described in the application.

6. The Department commenced an enforcement action pursuant to §30.03, Stats., seeking the removal of the allegedly unlawful piers. The hearing in the enforcement action was combined with a hearing on the application for a pier permit. The Department and Sunrise Point have complied with all procedural requirements of §30.02, Stats.

7. In the dredged channel eleven finger piers are attached to the concrete sea wall. Ten of the piers are twenty feet long and three feet wide. The eleventh pier, located at the south end of the channel, is thirty feet long and four feet wide. The eleven piers provide slips for 22 boats.

8. Construction of the swimming pier was complete in May, 1994. The swimming pier is tee-shaped. In response to concerns expressed by Department employees the applicant reconfigured the pier to reduce the distance the pier extends into Green Lake. Currently, the main portion of the tee is perpendicular to the shore and is 42 feet long and six feet wide. The bar portion of the tee (parallel to the shoreline) is 48 feet long and four feet wide. The swimming pier is not intended to provide mooring for any boats. The depth of the water at the lakeward end of the swimming pier is approximately three feet.

9. Construction of the lake pier was complete by July 4, 1994. In response to concerns expressed by Department employees the applicant reconfigured the pier to reduce the distance the pier extends into Green Lake. The pier presently extends ninety feet into the lake. The present configuration of the pier is an offset tee-shape. The portion of the tee perpendicular to the shoreline is 71 feet, nine inches long and four feet wide. The bar of the tee (parallel to the shoreline) is 78 feet long and four feet wide. Six finger piers are attached to the main pier. The finger piers are each fourteen feet, three inches long and four feet wide.

Four of the finger piers are attached to the north (lakeward) side of the bar portion of the tee, one finger pier is attached to the south side of the bar of the tee, and the sixth finger is attached to the east side of the main portion of the tee. The lake pier has slips for fourteen boats. The depth of the water at the lakeward end of the lake pier is approximately four feet. No pierhead line ordinance is in effect at the subject site.

10. The Holiday House was a resort which rented cabins on a short term basis. Rental of a cabin included use of a pier. The Holiday House also leased boat slips on a seasonal basis. Mr. Formiller testified that the maximum number of boat slips maintained at the site was 22 and one boat on a lift. Mr. Formiller also testified that he maintained piers on the lake side of the property for swimming and use by transient boaters. Mr. Formiller's testimony is consistent with the interpretation of aerial photos by Department witnesses. A real estate listing document for the subject property (exhibit 48) describes three piers on the property. Based on the description, all three piers appear to be on the lake frontage (as opposed to the channel). The descriptions do not indicate the number, if any, of boat slips on the three piers.

11. Piers on neighboring property extend further into Green Lake than do either the lake pier or the swimming pier on the applicant's property. Because the neighboring piers extend farther into the lake, maintenance of the subject piers in their configuration at the time of the hearing does not constitute an impairment to navigation for boats proceeding along the shore of Green Lake. The lake pier may present a slight impairment to navigation to boats entering and exiting the dredged channel; however, this impairment is not a concern since presumably all boats entering and exiting the dredged channel will be operated by persons familiar with the presence of the pier.

12. The lake bed in the near shore area in front of the applicant's property consists of sand and gravel. The area is used by fish for some foraging activity and by waterfowl. The area is not used for substantial spawning activity.

13. The subject piers in their configuration at the time of the hearing are not detrimental to the public interest in navigable waters. The basis for this finding is set forth in the discussion section below.

14. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

15. The permitted structures will not reduce the effective flood low capacity of Green Lake upon compliance with the conditions in the permit.

16. The permitted structures will not adversely affect water quality nor will they increase water pollution in Green Lake. The structures will not cause environmental pollution as defined in §144.01(3), Stats., if the structures are built and maintained in accordance with this permit.

17. The Department of Natural Resources has complied with the procedural requirements of §1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

The instant case is both an enforcement action and a review of an application for a pier permit. With respect to the enforcement action, the Department alleges that the subject piers require a permit pursuant to §30.12, Stats. Section 30.13, Stats., allows a riparian owner to maintain a pier without a permit as long as five conditions are met. The subject piers meet four of the five conditions. The remaining condition is that the pier may not "interfere with the public rights in navigable water."

Chapter NR 326, Wis. Admin. Code, further describes under what conditions a permit is required for a pier. Specifically §NR 326.05, Wis. Admin. Code, provides that a permit is required if the subject pier does not conform with the conditions set forth at §NR 326.04(1), Wis. Admin. Code. Section NR 326.04(1), Wis. Admin. Code, provides that a pier may not extend beyond the line of navigation. The line of navigation is defined as the contour line at 3 feet of water depth. The lake pier extends to four feet of water depth. Therefore, this pier extends beyond the line of navigation and for this reason alone a permit is required for it.

Additionally, the number of piers and boat slips the applicant has constructed exceeds the reasonable use for the amount of frontage owned by the applicant. For this reason also a permit pursuant to §30.12(2), Stats., is required for the subject piers. The Department has established that the applicant has violated §30.12, Stats. The Department has sustained its burden of proof in the enforcement action and an order requiring the removal of the subject piers is required unless a permit can be issued for the subject piers.

As mentioned above, §30.13, Stats., allows a riparian owner to maintain a pier. A pier may contain more than one slip; however, pursuant to common law, a riparian owner is limited to the reasonable use of his riparian zone. The issue is what constitutes reasonable use. The Department has attempted to define "reasonable use" in guidelines set forth in a memorandum dated December 19, 1991 (included in the Environmental Assessment, exhibit 4). The Department's guidelines with respect to boat slip density allow two slips for the first fifty feet of frontage and one slip for every additional fifty feet of frontage. The applicant has 650 feet of frontage, thus the Department's guidelines would allow slips for fourteen boats on the applicant's frontage.

Although the guidelines are not law, they do provide a useful starting point for evaluating a pier application. Ultimately, however, each application must be considered on a case-by-case basis. The relevant statutory criteria are whether the structure constitutes an impairment to navigation or is detrimental to the public interest.

Navigation includes not only operating a watercraft but also other incidents of navigation such as swimming, fishing, hunting, and skating. It is self evident that any

incident of navigation can not physically take place in the space occupied by the subject piers. Similarly, it is unlikely that any member of the public will engage in any incident of navigation in the near shore areas around the subject piers. The statute; however, requires that the obstruction be material. In the instant case, the applicant's piers do not extend into Green Lake further than neighboring piers. Therefore, from a practical standpoint it is unlikely that any significant boating activity would take place in the near shore area in front of the applicant's property regardless of whether or not the applicant had constructed the subject piers. The established patterns of navigation are undoubtedly beyond the length of the neighboring piers. With respect to other incidents of navigation, other than Warden Van Alsteen's testimony that on one occasion he observed people playing "horsey" in the area, the record contains no evidence that any incidents of navigation take place in the near shore area of the property of the applicant.

Public interest in navigable water includes enjoying natural scenic beauty, boating, fishing, swimming, and other recreation, and the preservation of wildlife habitat, aquatic plants and water quality. Preservation of natural scenic beauty for the enjoyment of the public is a legitimate public interest. However, it is not a factor in this case. Construction of the three story condominium building along with the loss of numerous mature trees (some of the trees were lost during construction of the condominium project and others were lost during a storm) on the uplands portion of the site has destroyed most of the natural beauty of the site. Additionally, the Department has permitted the placement of riprap along the lake frontage and construction of a concrete seawall in the dredged channel below the ordinary high water mark. Very little natural scenic beauty remains at the subject site. This is not to say that once natural scenic beauty is compromised by development anything goes; however, in the instant case any further destruction of the natural scenic beauty resulting from the maintenance of the subject piers is not significant.

Another public interest in navigable waters is providing habitat for fish and wildlife. The applicant argues that piers provide cover for fish and that many people specifically fish around piers because fish use the piers as cover. Saying fish use piers as cover is not the same as saying a pier improves fish habitat. The record contains no evidence that this particular area of shoreline is critical to fish in any way other than the fact that the additional activity generated by the piers will tend to drive the fish from the area. In a lake the size of Green Lake it is impossible to say driving the fish from an area the size of that at issue is detrimental to the public interests in preserving fish habitat without the existence of some unique feature of fish habitat. With respect to the activity of fishing, the record contains no evidence that the near shoreline area in front of the applicant's property is used significantly by fisherman. Dennis Walker, a fishing guide, testified that most fishing in this part of Green Lake takes place about 500 feet offshore.

The public has an interest also in providing habitat for other wildlife. The shoreline area where the subject permit is located is already highly developed. The record contains no

evidence that the area contains any critical wildlife habitat which will be impaired by the maintenance of the subject piers.

Another area of public interest is in aquatic plants. The Department presented evidence that a bed of wild celery exists in the vicinity of the lake pier. The Department further presented evidence that wild celery is beneficial to both fish and wildfowl. Witnesses for the department testified that a portion of the bed is shaded by the pier. A portion of the wild celery bed will be adversely affected by this shading and the increased boating activity in the immediate area generated by the pier. Wild celery plants are common in this area (exhibit 5). Loss of a portion of one wild celery bed as a result of maintenance of the subject piers is a legitimate concern, but by itself is not a sufficient basis to find that the maintenance of the subject piers is detrimental to the public interest.

Based on the public comments at the hearing, it is clear the primary concern regarding the piers in the application is potential contribution to the increasing amount of boat traffic on Green Lake. (This contention is reinforced by the lack of objection to the swimming pier which will have similar adverse impacts on natural scenic beauty and a portion of the wild celery bed and also constitute a comparable private intrusion into public waters.) The Department witnesses and the public objectors strongly objected to the number of boat slips in the applicant's proposal. The basis of the objection was that Green Lake is becoming increasingly congested and a limit on the number of boat slips on the lake needs to be imposed to prevent additional congestion. The record contains no evidence that the number of boat slips sought by the applicant will measurably increase the amount of boat congestion on the lake. On the contrary, the only evidence in the record is that the condo owners typically use their boats infrequently. The amount of increased boating activity resulting from the subject piers will be de minimus.

The Department does not object to the eleven piers with 22 boat slips in the dredged channel although 22 boat slips exceed the Department's reasonable use guidelines for the amount of frontage owned by the applicant. Similarly, the Department does not object to the swimming pier even though the Department does not typically recognize "swimming piers." The Department does not object to the maintenance of these piers because they are consistent with the historical use of the property. Although the applicant is seeking authorization for thirteen more boat slips than the established historical usage, the prior owner did have up to three piers along the lake frontage which were used for swimming and mooring "transient boats." Thus the amount of private intrusion sought by Sunrise Point into the public water is no greater than that of the prior owner.

Additionally, although the applicant is seeking 36 slips on 650 feet of frontage, more than two and a half times the number allowed under the Department's reasonable use guidelines, it must be noted that 22 of the slips are in a channel. Most of these piers will not be visible from the lake and the channel is not generally used by the public for fishing or

other incidents of navigation. The subject piers do not constitute an impairment to navigation and are not detrimental to the public interest.

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of §30.12, Stats.
2. The proposed piers described in the Findings of Fact constitute structures within the meaning of §30.12, Stats.
3. The Division of Hearings and Appeals has authority under §§30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the maintenance of said structures subject to the conditions specified.
4. The project is a type III action under §NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment. The Department prepared an Environmental Assessment (EA) in connection with this and related pier applications on Green Lake. The EA concluded that the project was not a major state action significantly affecting the quality of the human environment and that no EIS was required.
5. The subject piers do not constitute an impairment to navigation and are not "detrimental to the public interest in navigable waters" within the meaning of §30.12(2), Stats., if maintained in their configuration at the time of the hearing and in accordance with the conditions of the attached permit.
6. Pursuant to §30.12, Stats. and §NR 326.05, Wis. Admin. Code, a permit is required for the subject piers. The piers were constructed and maintained without a permit. Accordingly, the construction and maintenance of the piers constitutes a violation of §§30.12 and 30.15, Stats.
7. The construction and maintenance of the subject pier in violation of §§30.12 and 30.15, Stats. constituted a public nuisance pursuant to §30.294, Stats. This violation is abated by the issuance of the following permit.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under §30.12, Stats., for the construction of structures as configured at the time of the

hearing and as described in the foregoing Findings of Fact, subject, however, to the conditions that:


1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
4. This permit does not authorize any work other than what is specifically described. This permit authorizes the piers described in the application and constructed at the time of the hearing. No expansion in the number of pier slips is authorized without amendment to this permit.
5. This permit does not authorize the placement of mooring buoys at this location without modification of this permit.
6. All canopies or boat shelters must comply with the standards in Chapter NR 326, Wis. Admin. Code. In particular, canopies and boat shelters may not have side drops.
7. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on November 1, 1995.

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By



MARK J. KAISER

ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.